Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

William Rupert, *Petitioner,*

v.

F.D.I.C. (as the Statutory Successor to the Resolution Trust Corporation), as Receiver, and/or Conservator, for Columbia Savings & Loan Association, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

-oOo-

William Rupert
P.O. Box 66403
Scotts Valley, CA 95067-6403
(831) 335-7144

Petitioner
Pro Se

6588

QUESTIONS PRESENTED

1. Is Access To Courts A Fundamental Constitutional Right? -- Whether the constitutional right of meaningful access to the courts is a limited right, supported only by a short line of recent cases, of dubious distinction, that has seemingly been created out of whole cloth by activist judges concerned with due process and equal protection considerations of the 14th Amendment, as applied to the rights of prisoners; or, is the right to meaningful access to the courts one of the highest rights of citizenship, conservative of all other rights, traceable to the Magna Carta, and primarily based on the 1st Amendment's right to petition for a redress of grievances, with additional support to be found under article 4 of the Constitition and the 14th Amendment's equal protection and due process guarantees, such that it truly is an important, fundamental Constitutional right of all citizens, protected by the Bill of Rights - the right to an alternative to force to resolve disputes?

2. Is the "Special Attention" Rule Under FRCP 56 Properly Limited To Only Prisoner Pro Se Litigants? -- Whether the circuit split concerning the application of the "special attention" rule, when a Pro Se litigant is faced with a FRCP 56 summary judgment motion, should be resolved by limiting the application of this rule to only prisoners; or should the rule be equally applied to all civil pro se litigants?

3. Broad or Narrow "Claimant" Standing Under FIRREA? -- Whether "claimant" standing under the FIRREA Legislation (Financial Institutions Reform, Recovery, and Enforcement Act of 1989) was intended to be broadly defined, similar to Bankruptcy Code provisions, such that third party standing should be allowed in appropriate cases; or, should the net of FIRREA Claimant standing be narrowly cast, winnowing out creditors who are not sufficiently "interested" in obtaining money due them?

4. Is FIRREA Standing Created By Prior, Related, RTC Lawsuit ? -- Whether FIRREA Claimant standing is automatically conferred upon a party who has been sued by the RTC (Resolution Trust Corporation) for damages in a state court action, when the subsequent FIRREA Claim arises out of the same events and transactions alleged by the RTC in the earlier unresolved state court action against the FIRREA Claimant; or, can the RTC use the FIRREA claims process as a means to deny an individual his right to his day in court where he can vindicate himself and defend his actions, after he has been falsely accused of civil wrongdoing in a RTC lawsuit seeking compensatory and punitive damages and injunctive relief?

5. Are The Powers of Rescission & Restitution Separate Contract Powers? -- Whether, as a matter of California assignment and contract law (where the equitable remedy of rescission was abolished in 1961), are the powers of rescission and restitution separate and distinct rights, each calling for an individual assignment; or, are they necessarily linked and inseparable, such that an assignment of full authority to rescind a contract necessarily carries with it the standing to maintain an action for rescissory damages following the assignee's rescission of the contract?

6. Does FRAP 24 Require Specific Grounds To Be Stated When An Appeal Is Certified "Not Taken In Good Faith"? -- Whether, as a matter of appellate procedure under FRAP 24, when IFP (In Forma Pauperis) Applications are denied for non-economic reasons, on the basis the appeal is not taken in good faith, is the unsuccessful applicant entitled to a written statement of reasons that, at a minimum, shows some knowledge of the facts of the case, and/or, which discusses and considers the proposed grounds on appeal set forth in the rejected IFP Application; or, is the boilerplate practice approved by the Ninth Circuit adequate, simply checking a box on a pre-printed form?

PARTIES TO THE PROCEEDING

The parties are limited to those named in the caption, namely, William Rupert, an individual, and the Federal Deposit Insurance Corporation (the statutory Successor to the Resolution Trust Corporation), as Receiver and/or Conservator for Columbia Savings & Loan Association.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM RUPERT, *Petitioner,*

v.

F.D.I.C. (as the Statutory Successor to the Resolution Trust Corporation), as Receiver, and/or Conservator, for Columbia Savings & Loan Association, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petioner, William Rupert ("Rupert"), respectfully requests that a writ of certiorari be issued to review the judgments and certain orders of the United States Court of Appeals for the Ninth Circuit, and the District Court, for the Central District of California, in this case.

OPINIONS AND ORDERS BELOW

The Order of the Court of Appeals, denying Petitioner's Petition for Rehearing (Appendix A, *infra,* 1a), was filed on October 7, 1998, it was not reported.

The Memorandum Opinion of the Court of Appeals, filed June 12, 1998, (Appendix B, *infra,* 2a-4a), was not reported.

The Order of the Court of Appeals, denying Petitoner's 3rd motion for IFP status on appeal, was filed April 18, 1997 (Appendix C, *infra,* 5a).

The Order of the Court of Appeals, denying Petitioner's 2nd motion for IFP status on appeal, was filed October 23, 1996 (Appendix D, *infra,* 6a).

The Order of the District Court, denying Petitioner's 1st Application for IFP status on appeal, and certifying the appeal was not taken in good faith, was filed August 8, 1996 (Appendix E, *infra, 7a-8a).*

The Order of the District Court, denying Petitioner's Motion for Reconsideration, was filed on March 16, 1995 (Appendix F, *infra,* 9a-20a).

The Order of the District Court, granting the Respondent's FRCP 56 motion against the Petitioner, was filed on January 30, 1995 (Appendix G, *infra,* 21a-31a).

JURISDICTION

The Court of Appeals entered its judgment on June 12, 1998 (Appendix B, *infra*, 2a). Petitioner timely filed a Petition for Rehearing on July 27, 1998. The Court of Appeals entered its denial of the Petition for Rehearing on October 7, 1998 (Appendix A, *infra,* 1a). On January 5, 1999, timely Petitons were filed in the wrong form, and the Office of the Clerk gave the Petitoner a 60 day extension of time, pursuant to Rule 14.5, to make corrections. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

The United States Constitution, 1st Amendment, states:

> "**Congress shall make no law** respecting an establishment of religion, or **prohibiting** the free exercise thereof; **or abridging** the freedom of speech, or of the press; or **the right of the people**

> peaceably to assemble, and **to petition the Government for a redress of grievances."** (emphasis added)

FRAP 24(a), pertaining to applications or motions for permission to proceed IFP on appeal, provides, in pertinent part, "if the motion is denied, the district court shall state in writing the reasons for the denial."; and when an appeal is certified as "not taken in good faith", "the district court shall state in writing the reasons for such certification or finding."

FRCP 17(a) provides, in pertinent part,

> "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

California Civil Code § 1636 states:

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

California Civil Code § 1643 states:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

STATEMENT

A. Introduction

In 1977 Paulette Frankl (hereinafter "Frankl" signed a puported Lease agreement with Columbia Savings & Loan Association (hereinafter "CSL"), for the lease of valuable commercial real estate that Ms. Frankl had recently inherited from her parents. This property was located on Beverly Boulevard, just outside of Beverly Hills, California, where CSL wanted to develop a bank branch. (ER 13-25).

The purported Lease contained a Provision 17.12(a), that states the following, with regards to "Successors" and their rights under the lease:

> "Each and every covenant and condition, including options, contained in this lease shall bind and shall inure to the benefit of the parties hereto and their successors. **The term 'successors' is used herein in its broadest possible meaning and includes every person succeeding to any interest in this lease** or the premises of Landlord or Tenant herein, whether such succession results from the act of a party in interest, occurs by operation of law, or as the effect of the operation of law together with the act of omission of such party." (ER 022). (emphasis added).

In 1989 Frankl retained the Petitioner, William Rupert to be her Agent/Assignee/Trustee/Property Manager, after it was discovered that the CSL Lease was not a valid contract (due to its uncertain term [10-15-20-25-30 years], and due to the fraudulent, illusory provisions contained in the Lease that was drafted by CSL, giving them below market rental rates for up to 30 years), and, CSL had mistakenly, or fraudulently, extended the lease term from 10 to 15 years in

1987 (9 ½ years into the lease), when CSL's 58% delinquency rate in paying the real property taxes for the property (ER 218-229), had caused them to forfeit their right to extend the lease term, under Lease Condition 2.2 (ER 13).

Frankl and Rupert both signed a Compensation Memorandum, drafted by Frankl, on December 4, 1989, as evidence of the agency and assignment agreements and the compensation Rupert could obtain by achieving various objectives related to his obligation as Frankl's Trustee, to make the trust property productive. The Document (ER 205) did not represent the complete agreement between Frankl and Rupert, but it did evidence the chose in action Frankl assigned to Rupert, for underpaid back rent based on CSL's occupancy at bargain basement rental rates when they were not entitled to such bargain rates due to the invalidity of the lease and CSL's failure to pay the real property taxes before delinquency, as required by the lease. Rupert was to retain 30% of any lump sum settlement or recovery of this underpaid back rent amount, that ran into the hundreds of thousands of dollars by the time the assignment was made.

On January 31, 1990, Frankl and Rupert both signed an anendment to their Agency agreement (which was never fully reduced to writing), that stated the following transfers and assignments had been made to Rupert (making him a successor to the Landlord under Lease Provision 17.12(a)):

> "It is hereby agreed between Paulette Frankl and William Rupert that the property management agreement, whereby Mr. Rupert is to manage the property at 9018-9024 Beverly Boulevard, Los Angeles, CA shall be and hereby is amended by this agreement wherein Ms. Frankl, the landlord, appoints Mr. Rupert as the Landlord's attorney-in-fact in place and stead of landlord **with**

> **full authority to terminate, rescind and revoke the lease of space within the premises in any instance where Landlord does not do so, Landlord shall not revoke such appointment, and Landlord and Mr. Rupert shall cooperate to effectuate the purposes of termination, rescission or revocation during the term of Mr. Rupert's property management agreement**. (Emphasis added)(ER 208).

On February 21, 1990, CSL signed for (ER 216) and received a Termination Notice (ER 210-212), a Notice of Rescission and Notice of Revocation (ER 214), signed by Rupert as, "Landlord's Property Manager/Attorney-In-Fact/ Trustee". (ER 214).

CSL refused to honor the quasi-contract, for the return of consideration, that was created on February 21, 1990 when Rupert effected a completed unilateral rescission of the lease. In California, rescissions of this type are done by notice alone, as the equitable remedy of rescission was abolished in 1961. Legally, this type of situation is known as a rescission *in pais*, and it is quite different from an equitable action to have a contract rescinded (ER 268-280).

On January 25, 1991, CSL was placed into Conservatorship and the Resolution Trust Corporation (hereinafter "RTC") was appointed Conservator. On September 13, 1991, the RTC was appointed by the Office of Thrift Supervision as Receiver for the new Columbia.

Thereafter, on September 24, 1991, the RTC filed a Cross-Complaint in Los Angeles Superior Court Case No. BC031800, entitled *Frankl v. CSL*, against both Frankl and Rupert for, among other things, damages for the breach of the covenant of quiet enjoyment. (ER 355-391). In their Cross-Complaint, the RTC asserted the following facts:

> "Cross-Defendant RUPERT is and was the agent of Cross-Defendant FRANKL, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and with the permission, consent and knowledge of FRANKL."
> (ER 358:16-19).

The RTC Cross-Complaint, which sued Rupert as if he stood in the Landlord's shoes, concerning the Frankl/CSL lease, was served on Rupert on January 27, 1992. (ER 341:22-26).

Rupert responded by filing an Answer and a Cross-Complaint of his own against the RTC, on February 10, 1992. (ER 57-78).

The case was litigated until the RTC decided they didn't like the way things were going in state court, so they invoked the mandatory administrative claims procedures of the FIRREA legislation, and the exclusive federal jurisdiction thereafter.

Rupert was sent a letter by the RTC that established a Deadline of August 10, 1992 to file his claims against CSL with the RTC. (ER 395).

Rupert timely filed one claim for money actually due under the quasi-contract that was created on February 21, 1990 when Rupert's Notice of Rescission was received by CSL and CSL became obligated to make restitution of $252,000.00 (ER 85); and Rupert also filed a related tort claim against CSL for contractual interference (ER 87).

Both claims were denied by the RTC, on April 1, 1993, (ER 84, 86), on the grounds that "Ms. Frankl is the real party in interest, thus Mr. Rupert lacks the legal capacity to bring this claim."

Pursuant to the FIRREA legislation, Rupert timely filed his Complaint for De Novo Review of Rejected Claims Against Failed Savings & Loan Association [12 USC § 1821(d)(6)(A), effective June 1, 1993. (ER 1-78).

The RTC filed their Answer on November 29, 1993. (ER 93).

Over a year later, on December 5, 1994, the RTC filed their motion for partial summary adjudication, under FRCP 56, which mounted a new challenge (to Rupert's "standing"), that flew in the face of the allegations and facts previously alleged by the RTC in their earlier lawsuit against Rupert.

The RTC argued that Rupert's action for restitution (rescissory damages) was really a breach of contract action, and Rupert lacked standing to bring a breach of contract action.

Rupert opposed the motion by pointing out that the RTC was misrepresenting the very nature of his action, which was not a breach of contract action. Rupert pointed out his action was for rescissory damages following a completed unilateral rescission; and he offered evidence of his authority to rescind (two documents signed by Frankl and Rupert) (ER 206-208), and Rupert offered evidence of the legitmate basis for the rescission (CSL's record of repeated delinquent property tax payments, which they improperly concealed until Frankl hired Rupert) (ER 218-229).

On January 30, 1995, Judge Audrey B. Collins ruled that Rupert had "authority to rescind and revoke but not to bring an action for restitution." (ER 257:22-23), and that Frankl was the real party in interest on the restitution claim that arose after Rupert's rescission of the lease. (ER 256:22-23). Accordingly, the RTC was granted partial summary adjudication on Rupert's 1st Claim for accrued underpaid back rent (rescissory damages). Rupert was not allowed

permission to attempt to amend his action, and Frankl was not allowed an opportunity to join, substitute, or ratify the action for restitution, contrary to FRCP 17(a).

This appeal followed, although the denial of Rupert's IFP Application and the District Court certification the appeal was not taken in good faith, by checking a box on a pre-printed form instead of stating the specific grounds in writing, deprived Rupert of the ability to present an adequate record upon which to appeal the judgment in the RTC's favor on Rupert's other related RTC claim, which was mortally crippled by the inferences that were drawn against Rupert, on the basis of the partial summary adjudication order, which the District Court refused to reconsider, even though it was merely an interlocutory order the District Court had authority to revisit.

B. Significant Proceedings Below

The denial of Petitioner's IFP Applciations never discussed any of the proposed grounds outlined in the IFP Applications, such as the contentions that (1) the partial summary adjudication motion was unfairly granted on grounds not ever discussed or advanced by the RTC in their moving papers, contrary to *Katz v. Children's Hospital of Orange County, 28 F.3d 1520, 1534 (9th Cir. 1994) (ER 691); (2)* the idea that rescission and restitution were separate and distinct powers does not comport with California Rescission law and the quasi-contract approach to completed unilateral rescissions like the one the Petitioner effected on February 21, 1990 (See *McCall v. Superior Court*, (1934) 1 C.2d 527, 535, 36 P.2d 642)(ER 693); and, (3) proper contract interpretation principles were not used as the District Court wrongfully attempted to interpret a non-integrated agreement that was not fully before the Court, and then it was interepreted in a manner that made it impossible to be carried into effect, and which

was contrary to the mutual intent of the parties as it existed at the time of contracting, contrary to California Civil Code §§ 1636, 1643 (ER 697).

But for the denial of Petitioner's IFP Applications, he would have been provided with trial transcripts at tax-payer expense and he could have shown the trial testimony by CSL's lawyer in 1989 and 1990, Henry Shields, Jr. who testified he had numerous letters in his office from Frankl, concerning the Frankl/Rupert agreements and assignments, which the RTC failed to produce and claimed did not exist. These were the documents Petitioner was referring to when he sought a continuance under FRCP 56(f) (ER 197), so he could obtain these documents through discovery, which would have represented significant admissions about the scope and extent of the Frankl/Rupert agreements pertaining to the lease.

Quite simply, the RTC suppressed and concealed these documents, denying they even existed, because they would have confirmed the standing the Petitioner claimed he possessed, and they would have shown the RTC's FRCP 56 motion was not brought in good faith.

This case represents a massive miscarriage of justice, and a successful fraud on the court that has been perpetrated by the RTC so they can hang onto the ill-gotten gains that were first procurred by CSL's unlawful, fraudulent and unfair business practices with Ms. Frankl and Petitioner.

Petitioner has been greatly prejudiced by the improper IFP denials in this case, as will be shown by the partial transcript of Henry Shields, Jr.'s testimony, which the Petitioner ordered and paid for in mid-November, but which the court reporter still has not completed at this time.

If this Petition is granted, the transcript will be available for later review, that will confirm this actual prejudice that

has been suffered by the Petitioner, through no fault of his own.

REASONS FOR GRANTING THE PETITION

I. To Reafirm That The Right To Meaningful Access To The Courts Is One Of The Highest Rights Of Citizenship, It Is A Fundamental Constitutional Right, Raised Initially By The 1st Amendment And Controlled By 14th Amendment Concerns For Equal Protection And Due Process

It is submitted that the view expressed in the following case offers the preferred view, which should be adopted by this Supreme Court, concerning this fundamental right:

> "**[3,4]** The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907), the Supreme Court characterized this right of access in the following terms:
>
> > The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Consitution. (bold emphasis added by Petitioner)

207 U.S. at 148, 28 S.Ct. at 35 (citations omitted). It is clear that the Court viewed the right of access to the courts as one of the privileges and immunities accorded citizens under article 4 of the Constitution and the fourteenth amendment.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Supreme Court found in the first amendment a second consititutional basis for this right of access: 'Certainly the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right of petition.' *Id.* 92 S.Ct. at 612.

This court recognized the first amendment right of access to the courts in *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), where we stated: 'It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances.' *Id.* at 1387. See also *NAACP v. Buttons*, 371 U.S. 415, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1363 (5th Cir. 1983).

A number of other courts have also recognized that this right of access is encompassed by the first amendment right to petition. See *McCray v. Maryland*, 456 F.2d 1,6 (4th Cir. 1972); *Harris v. Pate*, 440 F.2d 315, 317 (7th Cir. 1971); *Pizzolato v. Perez*, 524 F.Supp. 914, 921 (E.D.La. 1981); *Crews v. Pertrosky*, 509 F.Supp. 1199, 1204 n. 10 (W.D.Pa. 1981).

A third constitutional basis for the right of access to the courts is found in the due process clause. In *Wolff v. MacDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Supreme Court defined the right of access in a civil rights action under section 1983 in the following terms:

> The right of access to the courts, upon which *Avery* [*Johnson v. Avery*, 393 U.S. 483, 89

> S.Ct. 747, 21 L.Ed.2d 718 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental consitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.

Id. 94 S.Ct. at 2986. See also *Mitchum v. Purvis*, 650 F.2d 647, 648 (5th Cir. 1981); *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th. Cir. 1979). The due process clause has also been construed to allow prisoners meaningful access to the courts. See *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

[5] A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.' *Bounds v. Smith*, 97 S.Ct. at 1495; see also *Rudolph v. Locke*, 594 F.2d at 1078."

Ryland v. Shapiro
708 F.2d 967, 971-972 (5th.Cir.1983)

On the other hand, a number of justices, in recent years, have continued to question whether the right of access to the courts really is a fundamental constitutional right at all, when viewing the matter through the prism of prisoner litigation. This contrary view appears to have first been expressed by Justice Rehnquist in his disenting opinion in the *Bounds* case, where he wrote the following:

> "the 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is

supposed to be derived."

Bounds v. Smith
430 U.S. 817, 840 (Dissent. J. Rehnquist)(1977)

This same theme seemed to resonate, more recently, in *Lewis v. Casey* , 518 U.S. 343, 135 L.Ed.2d 606, 618, 116 S.Ct. 2174 (1996), where Justice Scalia's majority opinion wrote of there being only a "35-year line of access-to-courts cases on which Bounds relied," *(Id.* at p. 618).

Justice Thomas further expounded upon this theme, with his ringing criticism of the *Bounds* Court's reasoning and analysis, in his concurring opinion in the same *Lewis* case, where he asserted the following point of view:

> "The weakness in the Court's consititutional analysis in *Bounds* is punctuated by our inability, in the 20 years since, to agree upon the constitutional source of the supposed right. We have described the right articulated in *Bounds* as a "consequence" of due process, (citations), as an "aspect" of equal protection, (citation), or as an "equal protection guarantee," (citation). In no instance, however, have we engaged in rigorous constitutional analysis of the basis for the asserted right."

Lewis v. Casey
518 US 343, 135 L.Ed.2d 606, 628, 116 S.Ct. 2174 (Concurring, J. Thomas) (1996)

Significantly, these anti-access expressions of opinion seem to fly in the face of many earlier Supreme Court opinions, including a 1983 Supreme Court case, authored by Justice White, wherein the court's opinion was that the right of access was a right that arose under the 1st Amendment to the United States Constitution. In this 1983 case, which represented the voice of a unanimous Court,

the following clear statement was made, concerning the right of access to the courts:

> "In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."
>
> *Bill Johnson's Restaurants, Inc. v. NLRB*
> 461 U.S. 731, 741 (1983)

Significantly, the *California Motor Transport Co.* Case (1972)(supra), was argued before Justice Rehnquist's nomination to the Supreme Court was confirmed, so he took no part in the 1972 decision. If Justice Rehnquist had taken part in this case, it is very possible he might not have written his harsh dissenting opinion in the 1977 *Bounds* Case, which questions whether access to the courts is properly regarded as a fundamental Constitutional right.

Moreover, as Justice Black explained in an earlier dissenting opinion, the right of access to the courts can be traced back to the Magna Carta:

> "Because of these deep-seated desires, the right to sue and be sued in courts according to the 'law of the land,' known later as 'due process of law,' became recognized. **That right was written into the Bill of Rights of our Consititution and in the constitutions of the states.** See *Chambers v. Florida*, 309 U.S. 227, 235-238." (emphasis added by Petitioner).
>
> *Republic Steel v. Maddox*
> 379 US 650, 669 (Dissent. J. Black) (1965)

Furthermore, if one takes just a few moments to research the 1st Amendment Right to Petiton on the Internet, through the Fedlaw or the Findlaw research sites, they will see this is a right that first came into prominence in the 1830's (in the fight against the evils of slavery), but it is, indeed, a fundamental right that can be traced back to the Magna Carta, as the alternative to force, which a civilized society must have firmly woven into the fabric of everyday live, if that society is to endure as a civilized, fair, and just society.

This petition should be granted so this important right can be reaffirmed by disapproving the way the Petitioner was denied adequate, effective and meaningful access to the District Court and to the Court of Appeals, as explained elsewhere in this petition.

II. To Resolve The Current Circuit Split Concerning The Pro Se "Special Attention" Rule Under FRCP 56

This split among the circuits was recently described as follows, on page 11 of 13, of the Cases And Materials On Pro Se Litigation And Related Issues, *Prepared for the ABA Lawyer's Conference Annual Meeting, Tucson, Arizona, May 1-4, 1997:*

> "Courts must accord 'special attention' to pro se litigants faced with summary judgment motions, *Ham v. Smith*, 653 F.2d 628 (D.C.Cir. 1981). At the very least, a litigant is entitled to be warned that when he is confronted by a summary judgment motion, he must obtain courter-affidavits or other evidentiary material to avoid the entry of judgment against him. *Timms v. Frank*, 953 F.2d 281 (7th Cir. 1992); *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968).

> Some circuits have limited this rule to prisoners. *Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988); *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986)('[a] litigant who chooses himself as legal representative should be treated no differently' than one with counsel, and requiring notice to non-prisoners of Rule 56 requirements 'implicates the court's impartiality and discriminates against opposing parties who do have counsel.') However, *Timms*, 953 F.2d at 285, held that 'the attempted distinction between prisoners and other pro se litigants with regard to this issue is unconvincing . . . [T]he idea that non-prisoners do not deserve notice because they have chosen to proceed pro se ignores the fact that most litigants who sue without a lawyer do so because they cannot afford one."

It is also telling that a strong dissenting opinion was filed by Circuit Judge Reinhardt in the Filler case, wherein he stated his opposition to limiting the special attention rule to only pro se litigants who were prisoners:

> "Because I believe that both the law of this circuit and the interests of justice require that *pro se* litigants be notified of their procedural obligations under Rule 56, I respectfully dissent from Part I of the majority's opinion."
>
> *Jacobsen v. Filler*
> 790 F.2d 1362, 1370 (Dissent. J. Reinhardt) (9th Cir. 1986)

This split among 5 circuits should be resolved through the granting of this Petition, followed by a remand to the District Court for the "special attention" Petitioner should have been accorded when he tried to oppose the RTC's deceptive FRCP 56 motion with additional evidence and legal argument. Unfairly, the District Court refused to

consider the new evidence or more thorough briefing on issues that hadn't been raised in the RTC's moving papers, only by the District Court, at the hearing on the RTC motion, without any advance warning from the court that the issues of rescission and restitution would be addressed.

Even normal attention in the instant case would have resulted in the RTC's FRCP 56 motion being denied, as all of Petitioner's evidence deserved to be considered and all of his legal issues deserved to be addressed, such as third-party standing and Petitioner's estoppel/waiver argument based on the RTC lawsuit against Petitioner (as the property owner's continuing agent), for breaching the covenant of quiet enjoyment, among other things.

The Petition should be granted so this circuit split can be resolved in favor of equal treatment for all pro se litigants.

III. To Settle The Important Question Of How Broadly The FIRREA Net Of Claimant "Standing" Should Be Cast

Petitioner argued in favor of third party standing in both the District Court and in the Court of Appeals (AOB 29-30). Neither court ever considered or discussed the issue or Petitioners contentions.

The Court of Appeals ignored Petitioner's third-party standing argument even though it was raised in Petitioner's Opening Brief (AOB 29-30), and not opposed or rebutted in any way in the FDIC's Opposition Brief.

Petitoner argued that the issue had been thoughtfully addressed in *Local 2 v. F.D.I.C.*, 962 F.2d 63 (D.C. Cir. 1992), wherein representational standing was determined to be accepable based on the determination that the FIRREA legislation was intended to be modeled after the provisions

of Bankruptcy Code, where the net of standing is broadly cast.

In order to answer the important question concerning whether the Net of FIRREA Claimant Standing should be broadly cast, the Petition should be granted and Petitoner's arguments in favor of third-party, or best friend standing, should be granted, as the Petitioner made the necessary showing that (1) the real party in interest was prohibited from bringing an action for rescissory damages against the RTC (now FDIC), (2) Petitioner and the real party in interest had a commonality of interests, and (3) Petitioner and the real party in interest were sufficiently linked together to insure that the Petitioner's pursuit of the rescissory damages would be mutually beneficial. See *Toth v. Quarles,* 350 U.S. 11,13, n.3 (1955).

IV. Important Questions Are Presented Concerning California Rescission Law; And, The Resultant Burden On The Courts When An IFP Application Is Denied Under FRAP 24

It was undisputed that the Petitioner had been assigned "full authority to terminate, rescind and revoke the lease" with Columbia Savings & Loan Associaition, and that Petitioner caused a Notice of Rescission to be delivered to Columbia S&L less than 3 weeks later, but the District Court ruled Plaintiff may have had standing to rescind the lease, but that did not include the standing to maintain an action for restitution, which was determined to be a separate power and not a power that was necessarily included in the power to rescind (in order to complete the rescission process following a completed unilateral rescission in accordance with California rescission law, where the equitable remedy of rescission was abolished in 1961). This ruling that rescission and restitution are separate, distinct powers was never supported by any type of legal authority, nor was it suggested in the RTC's FRCP 56 moving papers.

Moreover, it flies in the face of longstanding assignment cases such as *Phelps v. McDonald*, 99 U.S. 298, 304 (1878), wherein it was stated that:

> "If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable."

In this case, the Petitioner's rescission powers were interpreted in a manner that made it impossible for them to be carried into effect. Such an interpretation is incorrect.

Regarding FRAP 24, when an IFP Application is denied and an appeal is certified as "not taken in good faith", the statute states "the district court shall state in writing the reasons for such certification or finding." In *Denton v. Hernandez*, 503 U.S. 25 (1992) the Court ruled "there must be some factual development of the alleged frivolousness."

However, in the instant case, Petitioner had three IFP Applications denied for non-economic reasons without any factual development of the basis for the certification the appeal was not taken in good faith. Nor were any of the Petitioner's proposed grounds on appeal ever considered or discussed. In fact, there is no reason to believe that any judicial officer ever took the time to read any of the IFP Applications before arbitrarily denying the IFP Applications.

Although proceeding IFP on appeal is a privilege, if an applicant is to be denied this privilege, isn't he entitled to be told the specific grounds for such a denial?

This Petition should be granted so the Supreme Court can disapprove the boilerplate practice of the Central District of California of simply checking a box saying "not taken in good faith", which the Ninth Circuit tacitly condoned and approved in this case by failing to remand for a

statement of specific grounds, or by stating the grounds themselves. The Petitioner is entitled to an explanation that shows someone actually considered his proposed grounds on appeal, which were contained in his IFP Applications to the District Court (ER 688-710) and to the Ninth Circuit. This is an important question that should be clarified by this Supreme Court - should IFP denials be informed decisions?

V. The Decisions Of The Court Of Appeals, And The District Court, Have Been Erroneous And Unjust

Neither the District Court nor the Court of Appeals used the proper standards in ruling on the RTC's FRCP 56 motion. The Petitioner was the non-moving party, but his reasonable request for a continuance under FRCP 56(f) fell on deaf ears (ER 197); the evidence was not viewed in a light most favorable to the Petitioner; and no reasonable inferences were drawn in favor of the Petitioner. See *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 474 U.S. 574, 587 (1986).

Petitoner's cross-motion for partial summary adjudication against the RTC (ER 198), was supported by evidence, it was not opposed by the RTC, who declined to file any type of Reply papers, yet it was not addressed by the trial court or ever ruled upon - it was simply ignored. This issue was raised in the Petitioner's Opening Brief (AOB 14-15), but it was also ignored by the Court of Appeals.

Contrary to FRCP 17, Petitioner's 1st cause of action was dismissed on the basis that he was not the real party in interest, but no time was allowed for the real party in interest to join or ratify the action for rescissory damages.

Nor was the Petitioner allowed the opportunity to amend to state a cause of action for restitution under California

Business & Professions Code section 17200 et seq., based on the Columbia Savings & Loan Association business practices that were alleged by the Petitioner to be unfair, illegal or fraudulent in nature, which had caused injury to Ms. Frankl and to the Petitioner.

CONCLUSION

The Petition should be granted so this Supreme Court can use this case as a vehicle to reach important issues, resolve significant circuit splits of authoritiy, reaffirm the fundamental Constitutional right of meaningful access to the courts, and exercise supervisory responsibility over certain disturbing practices that have been condoned and accepted by the Ninth Circuit, which is dispensing a separate and unequal brand of disposal justice towards Pro Se litigants, regardless of the merits of the individual cases.

The anti-Pro Se bias has now reached a constitutional dimension, and the Supreme Court needs to step forward if civil, non-prisoner pro se litigants are not to be regarded as somehow beneath the law, with less rights than those represented by counsel, and with even less access rights than those pro se litigants who are incarcerated in jail.

The fundamental right of meaningful access to the courts is too important to allow it to be sacrificed upon the altar of judicial convenience and expediency.

Dated: February 28, 1999

William Rupert
Petitioner
Pro Se

APPENDIX

APPENDIX A -- Order Of The Court Of Appeals Denying Petition For Rehearing, Filed October 7, 1998

United States Court of Appeals for the Ninth Circuit

96-56259

WILLIAM RUPERT

V.

RESOLUTION TRUST CORPORATION, as Receiver and/or Conservator for Columbia Savings & Loan Association.

ORDER

Before: REINHARDT, THOMPSON and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Reinhardt and Thompson vote to reject the suggestion for rehearing en banc and Judge Leavy so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No further filings shall be filed or entertained in this closed case.

APPENDIX B -- Memorandum Opinion Of The Court Of Appeals Affirming The District Court, Filed June 12, 1998

NOT FOR PUBLICATION
United States Court of Appeals for the Ninth Circuit

96-56259

WILLIAM RUPERT

V.

FEDERAL DEPOSIT INSURANCE CORPORATION,** as Receiver and/or Conservator for Columbia Savings & Loan Association.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen J. Hillman, Magistrate Judge, Presiding

Submitted June 8, 1998***

Before: REINHARDT, THOMPSON, and LEAVY
Circuit Judges.

William Rupert appeals pro se the district court's summary judgment in favor of the Federal Deposit Insurance Corporation ("FDIC/R") on Rupert's claim for restitution under the Federal Institutions Reform and Recovery Enforcement Act, 12 U.S.C. § 1821(d)(6)(A)(ii).

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Pursuant to the Resolution Trust Corporation Completion Act, 12 U.S.C. § 1441a(m)(1), the Resolution Trust Corporation ("RTC") was terminated and its functions statutorily succeeded by the Federal Deposit Insurance Corporation ("FDIC"). Accordingly, the FDIC is substituted for the RTC as the defendant in this action.

*** The panel unanimously finds this case suitable for decision without oral argument. Accordingly, we deny Rupert's request for oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the grant of summary judgment and question of standing, see ACF Indus. Inc. v. California State Bd. of Equalization, 42 F.3d 1286, 1289 (9th Cir. 1994), and we affirm.

The district court did not err by determining that Rupert lacked standing to bring his first cause of action for restitution. See Smith v. Block, 784 F.2d 993, 995 (9th Cir. 1986) (listing requirements for standing). The district court did not err by granting summary judgment because defendant's motion gave Rupert adequate notice that defendant was moving for summary judgment on his first cause of action. In addition, Rupert presented evidence and adequately briefed the issue in his opposition to the summary judgment motion and at oral argument. See Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311-12 (9th Cir. 1982).

The district court did not abuse its discretion by denying Rupert's motions to alter or amend the judgment, brought pursuant to Fed. R. Civ. P. 59(e), or for relief from judgment, brought pursuant to Fed. R. Civ. P. 60, because none of the grounds advanced by Rupert entitle him to relief. See School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1262-63 (9th Cir. 1993) (listing grounds). The

district court did not err by construing Rupert's Fed. R. Civ. P. 60 motion as a reply brief, and refusing to allow him to file a reply. See In re Qintex Entertainment, Inc., 950 F.2d 1492, 1498 (9th Cir. 1991) (Central District's local rules do not require court to allow party to file a reply brief).

The district court did not abuse its discretion by denying Rupert's motions to disqualify the magistrate judge to whom Rupert consented.[1] See 28 §§ U.S.C. 455(a) and 455(b)(1) (disqualification where impartiality might reasonably be questioned, for personal bias or prejudice, or for personal knowledge of disputed evidentiary facts); Liteky v. United States, 510 U.S. 540, 55 (1994) (judge's bias or personal knowledge of facts must arise from extrajudicial source); see also 28 U.S.C. § 455(e) (waiver of ground under subsection (a) may be accepted if there is full disclosure of the basis for disqualification).

The district court did not abuse its discretion by denying Rupert's requests to proceed in forma pauperis, both in the district court and on appeal. See O'Loughlin v. Doe, 920 F.2d 614, 616-17 (9th Cir. 1990) (stating that this court may review denial of in forma pauperis status despite district court's failure to state bases for denial). Because the magistrate judge had the authority to deny Rupert's request for in forma pauperis status, he did not err by entering the denial nunc pro tunc.[2]

AFFIRMED.

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[1] We deny Rupert's motion for judicial notice.

[2] We reject Rupert's remaining contentions because they lack merit.

APPENDIX C -- Order Of The Court Of Appeals Denying Petitioner's 3rd Motion For IFP Status On Appeal, Filed April 18, 1997

United States Court of Appeals for the Ninth Circuit

96-56259

WILLIAM RUPERT
V.
RESOLUTION TRUST CORPORATION, as Receiver and/or Conservator for Columbia Savings & Loan Association

ORDER

On February 24, 1997, the court received "Appellant's resubmission of motion to proceed in forma pauperis/with reporter's transcripts at taxpayer's expense." Appellant's "resubmission" is construed as a motion for reconsideration of the court's October 23, 1996 order. So construed, the motion is denied as untimely. See 9th Cir. R. 27-10 (motion for reconsideration must be filed within 14 days of the date of the order).

The court also is in receipt of court reporter Magda Flores' motion for an extension of time to file the reporter's transcripts. The motion is granted. The transcript is due May 30, 1997. Appellant's opening brief and excerpts of record are due July 9, 1997; appellee's brief is due August 8, 1997; the optional reply brief is due within 14 days after service of appellee's brief. For the Court

s/ Kirsten K. Anderson
Kirsten K. Anderson,
Motions Attorney/Deputy Clerk,
9th Cir. R. 27-7, General Orders/Appendix A

APPENDIX D -- Order Of The Court Of Appeals Denying Petitioner's 2nd Motion For IFP Status On Appeal, Filed October 23, 1996

United States Court of Appeals for the Ninth Circuit

96-56259

WILLIAM RUPERT

V.

RESOLUTION TRUST CORPORATION, as Receiver and/or Conservator for Columbia Savings & Loan Association.

ORDER

Before: BEEZER and KOZINSKI, Circuit Judges

Appellant's motion for transcripts at government expense is denied.

Appellant's motion for an extension of time to designate the transcripts is granted. Appellant shall designate the reporter's transcripts by December 16, 1996. The transcript is due January 15, 1997. Appellant's opening brief and excerpts of record are due February 24, 1997; appellee's brief is due March 26, 1997; the optional reply brief is due within 14 days after service of appellee's brief.

APPENDIX E -- Order Of The District Court For The Central District Of California Denying Petitioner's 1st IFP Application, And Certifying Petitioner's Appeal Was Not Taken In Good Faith, Dated August 8, 1996, Entered August 12, 1996, Served On August 28, 1996

United States District Court, Central District Of California

CV 93-3165 SH

WILLIAM RUPERT
V.
RESOLUTION TRUST CORPORATION, as Receiver and/or Conservator for Columbia Savings & Loan Association

ORDER

(The check mark in the appropriate box indicates the Order made)

[X] THE COURT HAS CONSIDERED THE MOTION AND THE MOTION IS DENIED. The Court certifies that the proposed appeal is not taken in good faith under 28 U.S.C. 1915(a) and is frivolous, without merit and does not present a substantial question within the meaning of 28 U.S.C. 753(f).

The Clerk is directed to serve copies of this Order, by United States Mail, upon the parties appearing in this cause.

DATED: August 8, 1996 s/ Stephen J. Hillman
Stephen J. Hillman
UNITED STATES MAG. JUDGE

[ ] THE COURT HAS CONSIDERED THE MOTION AND THE MOTION IS GRANTED. It appears to the Court that

the proposed appeal is taken in good faith within the meaning of 28 U.S.C. 1915(a). The Court certifies that the proposed appeal is not frivolous, that it presents a substantial question, and that a transcript is needed to decide the issue presented by the proposed appeal, all within the meaning of 28 U.S.C. 753(f). The within moving party is authorized to prosecute an appeal in forma pauperis to the United States Court of Appeals for the Ninth Circuit without pre-payment of any fees or costs and without giving security therefor. The Court Reporter is directed to prepare and file with the Clerk of this Court an original and one copy of a transcript of all proceedings had in this Court in this cause; the attorney for the appellant is advised to borrow a copy for his use from the clerk of the court of Appeals. The expense of such transcript shall be paid by the United States pursuant to 28 U.S.C. 1915(b) and 753(f).

The Clerk is directed to serve copies of this Order, by United States mail, upon the parties appearing in this cause.

DATED: _____ _____

UNITED STATES DISTRICT JUDGE

APPENDIX F -- Order Of The District Court For The Central District Of California Denying Petitioner's Motions To Reconsider, Filed March 16, 1996

United States District Court,Central District Of California

CV 93-3165 ABC (SHx)

WILLIAM RUPERT

V.

RESOLUTION TRUST CORPORATION, as Receiver and/or Conservator for Columbia Savings & Loan Association.

ORDER RE: Plaintiff's Motion for Reconsideration

Before: AUDREY B. COLLINS,
United States District Court Judge

Plaintiff's Motion for Reconsideration was taken under submission by Minute Order dated February 21, 1995. After reviewing the materials submited by the parties and the case file, it is hereby ORDERED that: Plaintiff's Motion is DENIED.

I. BACKGROUND

On or about April 1, 1977, the former Columbia Savings and Loan Association ("CSL") and Paulette Koenig executed a lease for real property owned by Paulette Koenig, now Paulette Frankl ("Frankl"). The lease provided for an initial term of ten years, plus four option periods of five-years each. At the conclusion of the initial lease term (July 1, 1987), CSL exercised its first option to extend the lease to July 1, 1992.

On December 4, 1989, Plaintiff WILLIAM RUPERT ("Rupert") entered into an agreement with Frankl by which Plaintiff became Frankl's property manager for the leasehold with CSL. The handwritten agreement ("1st" Agreement"), which was signed by both parties, provided as follows:

> This is an agreement between Paulette Frankl and William ("Bill") Rupert as property manager for PF's leasehold with Columbia Savings and Loan.
>
> It is agreed that W. Rupert will have four months to increase the rental income for this property.
>
> Compensation: Rate of $15 - per hour for time spent: correspondence; research; negotiations
>
> 30% of any lump sum settlement as well as
>
> 20% of additional rents for three years or 1st lease term period, whichever is longer.

(Defendant's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues ("Def.'s Mem. Supp. Summ. J."), Ex. B.)

On January 31, 1990, Plaintiff and Frankl amended the 1st Agreement with a second handwritten document, signed by both parties, that provided as follows:

> It is hereby agreed between Paulette Frankl and William Rupert that the property management agreement, whereby Mr. Rupert is to manage the property at 9018-9024 Beverly Boulevard, Los Angeles, CA, shall be and hereby is amended by this

> agreement wherein Ms. Frankl, the landlord, appoints Mr. Rupert as the landlord's attorney-in-fact in place and stead of landlord with full authority to terminate, rescind and revoke the lease of space within the premises in any instance where landlord does not do so, Landlord shall not revoke such appointment, and Landlord and Mr. Rupert shall cooperate to effectuate the purposes of termination, rescission or revocation during the term of Mr. Rupert's property management agreement.

(Def.'s Mem. Supp. Summ. J., Ex. D.) The parties agree that Plaintiff never held an ownership interest in the underlying real property, although Plaintiff argues that he owns a 30% interest in the personal property debt (accrued back rent) owed by CSL.

In a letter dated February 14, 1990, Frankl wrote the following to Plaintiff:

> The situation with [CSL] is NOT a win. We both risk to lose in a very big way. It is for this reason that I have opted to dismiss the whole thing. My agreement with you was to try to increase the income on my property. you did your best, but there were blind spots. I don't hold this against you. I am not out to harm you, nor do I intend to let you harm me. I want that to be very clear.
>
> Our agreement was for property management, not for legal representation. You are NOT to engage in any legal proceedings on my behalf. I had no power to confer on you the power to represent me in court, and you don't have any power to prosecute [sic] any lawsuits on my behalf. This power can only be conferred by the Superior Court of California.

(Def.'s Mem. Supp. Summ. J., Exhibit Q.)

In a letter dated February 19, 1990, Plaintiff, "in his [purported] authorized capacities as the landlord's Property Manager/Attorney-In-Fact/Trustee" informed CSL that he was rescinding the first extended term and revoking the second, third and fourth extended term periods. (Rupert Decl., Ex. D) To justify such action, Plaintiff explained in the letter that CSL had defaulted on the terms of the original lease, thus rendering CSL ineligible to exercise any of the option periods.[1] Plaintiff demanded that CSL pay back rent in the amount of $252,000.00 -- the difference between the "reasonable rental value" and the "contract rent" actually paid during the period that CSL was exercising its option for the first extended period. In the letter, Plaintiff stated that "the tenant [CSL] must restore to the landlord the 'reasonable rental value" of the premises," but added that "[t]his net amount is due and payable to the landlord's Property Manager/Attorney-In-Fact/Trustee, Mr. Rupert." Id. (emphasis added). Plaintiff alleges that the back rent is payable to Plaintif as a personal property obligation.[2]

Plaintiff set forth his understanding of the agreement between himself and Frankl in a letter dated March 29, 1990. The letter provides, in pertinent part, that:

---

[1] Plaintiff alleges that CSL had defaulted on the terms of the original lease because, inter alia, CSL had been delinquent in paying property taxes.

[2] According to the terms of the December 4, 1989 agreement between Plaintiff and Frankl, however, Plaintiff is only entitled to either: (i) 30% of the back rent if such back rent can be characterized as a "lump sum settlement" under the terms of the agreement; or (ii) 20% of the back rent if such back rent can be characterized as "additional rents" under the terms of the agreement.

> I [Plaintiff] agreed to take on this matter, as your [Frankl's] property manager/agent. We signed a contract that spelled out my objectives, and the compensation I could earn by achieving those objectives and collecting on your claims against [CSL]. As you were the beneficiary of our contract, I was placed in a "trustee" position with regard to the trust property on Beverly Boulevard.

(Def.'s Mem. Supp. Summ. J., Ex. O) (emphasis added).

On January 25, 1991, CSL was placed into conservatorship and Defendant Resolution Trust Corporation ("RTC") was appointed the conservator.

On June 2, 1993, Plaintiff filed an action in his own name as plaintiff in "Pro Per." The First Amended Complaint, filed on June 18, 1993, alleges the following causes of action: (1) unpaid back rent (personal property); and (2) contract and economic interference. In the Complaint, Plaintif alleges that he was hired as Frankl's "property manager/trusteee/etc." and that she had "assigned her claims under the lease to the plaintiff." (1st Am. Compl. ¶ 7:18-19.)

On December 5, 1994, Defendant RTC, as receiver for CSL, filed a motion for partial summary adjudication of issues, alleging that Plaintiff lacks the requisite standing to bring a claim for unpaid back rent (personal property).[3]

---

[3] Defendant moved for summary adjudication of "claims for breach of contract," yet the causes of action set forth in Plaintiff's First Amended Complaint are limited to "unpaid back rent (personal property)" and "contract and economic interference." To reconcile Defendant's motion with Plaintiff's Complaint, the Court interpreted Defendant's motion as a motion for summary adjudication of Plaintiff's first cause of action for unpaid back rent (personal property).

After hearing oral argument, the Court granted Defendant's motion on January 30, 1995.

On February 10, 1995, Plaintiff filed a Motion for Reconsideration of the Court's January 30, 1995 Order pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 7.16 of the Local Rules for the United States District Court for the Central District of California ("Local Rules"). Defendant filed an Opposition on February 24, 1995. The Court, in a Minute Order dated February 21, 1995, vacated the hearing date of March 13, 1995, and took the matter under submission.

On February 27, 1995, Plaintiff filed a second Motion for Reconsideration, pursuant to Federal Rule of Civil Procedure 60(b)(1), (3), and (6), with a scheduled hearing date of March 20, 1995. The Court, in a Minute Order dated march 2, 1995, vacated the March 20, 1995, hearing date and ordered that: (1) Plaintiff's second motion would be construed as a Reply to Defendant's Opposition, and (2) no further briefing would be accepted on the matter with the exception of a surreply by Defendant RTC.[4] On March 6, 1995, RTC filed a Surreply.

II. DISCUSSION

A. Standard

The general standard for granting an amendment to a judgment is supplied by Federal Rule of Civil Procedure 59

---

[4] Despite the Court's Order, Plaintiff filed a Reply to Defendant RTC's Opposition to Motion for Reconsideration on March 7, 1995. In accordance with the Court's March 2, 1995 Order, that Reply has not been considered by the Court in reaching its decision on Plaintiff's motion.

which provides, in pertinent part, as follows:

> (a) **Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues ... (2) in an action tried without a jury, for any of the reasons for which a rehearing have heretofore been granted in suits in equity courts of the United States.
>
> (b) **Motion to Alter of Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(a), (e). [5]

Local Rule 7.16 sets forth the very narrow grounds upon which amendment of a judgment by a motion for reconsideration may be granted in the Central District. Rule 7.16 provides that a motion for reconsideration may only be made on the following grounds:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

Local Rule 7.16. The rule further provides that "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." Thus, it is only under exceptional circumstances that a court grants a motion for reconsideration.

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[5] The Court finds Plaintiff's motion timely.

B. Analysis

Plaintiff argues that subsections (a) and (c) of Local Rule 7.16 "seem to be applicable." (Plaintiff's Motion for Reconsideration ("Pl.'s Mot. Recons.") at 15.)

1. Material Difference of Fact or Law

Plaintiff contends that "[a]s an unbriefed issue (rescission), it was impossible for the plaintiff to anticipate that it would come up." Given that Plaintiff's opposing papers to the RTC's motion for partial summary adjudicationof issues were replete with references to a "Completed Unilateral Rescission," however, Plaintiff's assertion that he was unable to brief the issue adequately is without merit. Indeed, in finding that Plaintiff lacked standing because he did not have the power to seek restitution, the Court specifically considered the issue of rescission in its Order of January 30, 1995. See January 30, 1995 Order at 9 ("Plaintiff argues that he has standing because, as the sole rescinding party, [Plaintiff asserts that] 'he is the only person who has standing to bring a cause of action for restitution.") Accordingly, the Court finds that Plaintiff has not set forth a material difference in fact or law from that presented to the Court prior to the January 30, 1995 Order.

2. Manifest Failure to Consider Material Facts

Plaintiff asserts that the Court's January 30, 1995 Order demonstrates a manifest failure to consider material facts that were presented to the Court before its decision. Plaintiff contends that the Court failed to consider: (1) Plaintiff's quasi-contract theory; (2) Plaintiff's standing to sek restitution; (3) that Plaintiff was a party to the lease; and (4) that Frankl assigned Plaintiff the right to seek restitution.

a) Quasi-Contract Theory

Plaintiff argues that a quasi-contract was created between himself and CSL (now RTC) when CSL received his notice of rescission. However, the cases cited by Plaintiff are readily distinguishable as in each case, the party asserting the quasi-contract had given consideration. For example, even the excerpt quoted by Plaintiff from Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 170, 171 (1913) refers to an action "to recover the consideration parted with." Plaintiff, as the Court explained in its earlier Order, has not parted with any consideration, and thus, Plaintiff is not a party to the lease. As Frankl did not expressly grant Plaintiff the power to seek restitution, he lacks standing to bring his action.

b) Standing to Seek Restitution

In a variant on this same theme, Plaintiff asserts that the power to rescind provides the power to sek relief based on rescission. However, Plaintiff's assertion is not a proper basis for a Motion for Reconsideration as this very argument was raised by Plaintiff and rejected by the Court in its January 30, 1995 Order.

c) Plaintiff as Party to the Lease

Plaintiff asserts, without authority, that "it is also settled that this power [to rescind a lease] is only available to those with a status as 'a party to a contract.'" (Pl.'s Mot. Recons. at 11:24-26.) However, nothing in the record before this Court establishes that Plaintiff ever had any contractual relationship with CSL.

d) Alleged Asignment of Rights to Plaintiff

Plaintiff's final argument is that the Court failed to consider facts establishing an assignment by Frankl to Plaintiff for collection of accrued back rents. Plaintiff's assertion is unavailing for two reasons: first, RTC discussed the issue of possible assignment in its Motion for Summary Adjudication of Issues and Plaintiff failed to rebut RTC's arguments; and second, Plaintiff canot prove the existence of such an alleged assignment solely on the basis of letters that he wrote.

(1) RTC's Discussion of Assignment

Plaintiff's assertion that the Court, in its January 30, 1995 Order, overlooked the issue of his alleged assignment is countered by the five page argument put forward by Defendant RTC in its Motion for Summary Adjudication. (See Def.'s Mem. Supp. Summ. J., at 9-13.) In its argument, Defendant examines Plaintiff's claim and describes why no such assignment should be found. Plaintiff, in his Opposition to RTC's motion dated January 17, 1995, never responded to RTC's argument that no assignment ever occurred. Thus, the only material facts before the Court were those presented by RTC, and the Court considered those facts in making its decision.

(2) Plaintiff's Failure of Evidence

Plaintiff asserts that the provision for paying him 30% of any lump sum settlement was "based on the assignment by Frankl of her back rent claims under the lease." (Pl.'s Mot. Recons. at 16:23-27.) Indeed, Plaintiff asserts, "[w]ithout the assignment for collection of the back rent, there would

have been no lump sum amount to seek to recover in any form of settlement."[6] (Pl.'s Mot. Recons. at 17:4-6.)

In support of his contention that such an assignment took place, Plaintiff directs the Court to a passage from his March 29, 1990, letter to Frankl. In that passage, which was cited by the Court in its January 30, 1995 Order, Plaintiff speaks of "collecting on your claims against [CSL]." (January 30, 1995 Order at 4:15-18.) Plaintiff contends that the Court misunderstood the significance of that passage, insisting that:

> [T]he court seemed to fail to consider the entire phrase was [sic] "colecting on your claims," which clearly infers the assignment for collection that the plaintiff has been maintaining against CSL and now the RTC."

(Pl.'s Mot. Recons. at 17:18-21.)

Furthermore, Plaintiff suggests that the assignment was actually done orally, that the written Compensation Memorandum is sufficient evidence of that assignment, and that at any rate, the law allows for an assignment to be in any form, including solely oral. To support that contention, Plaintiff cites to Hibernia Sav. & Loan Soc'y v. Belcher, 4 Cal. 2d 268 (1935):

> Accrued rents are a chose in action ordinarily assignable orally, and hence it was not necessary that assignment thereof be made in writing.

Id. at 275.

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[6] This assertion overlooks at least one reasonable alternative; the lump sum amount could have been paid directly to Frankl who then would have been obligated to pay Plaintiff's 30% commission.

However, Plaintiff has omitted a variety of key details that explain why the Hibernia case reached its decision and which shed significant light on the instant matter. First, Plaintiff omitted several significant words from the above citation which substantially alter its meaning. The Hibernia court actually said: "it was not necessary that assignment thereof by Ellis be made in writing executed by him as president of the corporation." Id. (emphasis added to show omissions). Second, in Hibernia, while it is true that there was no specific instrument of assifnment written by the president of the corporation, there was a signed writing that memorialized the alleged assignment. The Hibernia assignment consisted of a resolution by the corporation's Board of Directors, including its president, that was recorded in the minutes of the corporation and signed by the corporation's secretary. Those minutes, introduced into evidence, recorded that the resolution assigned, "all of [the corporation's] right, title, claim, interest and estate in and to all moneys ... rents, etc., uncollected ... and now due and payable from tenants of the property." Id. at 272.

In contrast to the facts presented by the Hibernia case, Plaintiff has utterly failed to adduce any credible evidence of an assignment that would give him standing to bring his purported claim. It is that failure which formed the basis for the Court's January 30, 1995 Order, and it is the reason that the Court finds Plaintiff's arguments under Federal Rule of Civil Procedure 59(e) and Local Rule 7.16 to be unavailing. Accordingly, the Court DENIES Plaintiff's Motion for Reconsideration pursuant to Rule 59(e) and Local Rule 7.16.

C. Plaintiff's "Reply" Argument Under Rule 60

Plaintiff's second Motion for Reconsideration, dated February 27, 1995, and herein construed as a Reply to

Defendant's Opposition, relies upon Federal Rule of Civil Procedure 60. Rule 60 provides, in pertinent part, as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ... misrepresentation, or other misconduct of an adverse party; ... (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)

Plaintiff argues that he was surprised that the Court would take seriously Defendant's arguments about his lack of standing to bring the instant action. Plaintiff's misunderstanding of the gravity of these proceedings is not the type of conduct entitled to relief under Rule 60(b). See 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 2858-2861, 2864 (1971). As the Court finds that Plaintiff's argument does not meet the standards imposed by Rule 60(b), the Court DENIES Plaintiff's Motion for Reconsideration pursuant to Rule 60.

III. CONCLUSION

For these reasons, the Court hereby ORDERS that:

Plaintiff's Motion for Reconsideration pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure and Local Rule 7.16 is DENIED.

SO ORDERED.

DATED: March 16, 1995

s/ Audrey B. Collins
Audrey B. Collins
United States District Judge

APPENDIX G -- Order Of The District Court For The Central District Of California Granting The RTC's FRCP 56 Motion, Against The Petitioner, Filed January 30, 1995

United States District Court, Central District Of California

CV 93-3165 ABC (SHx)

WILLIAM RUPERT

V.

RESOLUTION TRUST CORPORATION, as Receiver and/or Conservator for Columbia Savings & Loan Association.

ORDER RE: Defendant's Motion for Partial Summary Adjudication of Issues

Before: AUDREY B. COLLINS,
United States District Court Judge

Defendant's motion for partial summary adjudication of issues came on regularly for hearing before this Court on January 30, 1995. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendant's motion is GRANTED.

I. Background

On or about April 1, 1977, the former Columbia Savings and Loan Association ("CSL') and Ms. Paulette Koenig executed a lease for real property owned by Ms. Paulette Kownig, now Paulette Frankl ("Ms. Frankl"). The lease provided for an initial term of ten (10) years, plus four (4)

five (5) - year option periods. At the conclusion of the initial lease term (July 1, 1987), CSL exercised its first option to extend the lease to July 1, 1992.

On December 4, 1989, Plaintiff William Rupert entered into an agreement with Ms. Frankl by which Plaintiff became Ms. Frankl's property manager for the leasehold with CSL. The handwritten agreement, which was signed by the parties, provided as follows:

> This is an agreement between Paulette Frankl and William ("Bill") Rupert as property manager for PF's leasehold with Columbia Savings and Loan.
>
> It is agreed that W. Rupert will have four months to increase the rental income for this property.
>
> Compensation: Rate of $15 - per hour for time spent: correspondence; research; negotiations
>
> 30% of any lump sum settlement as well as
>
> 20% of additional rents for three years or 1st lease term period, whichever is longer.

Exhibit B to Defendant's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues.

On January 31, 1990, Plaintiff and Ms. Frankl amended their relationship with a second signed, handwritten document that provided as follows:

> It is hereby agreed between Paulette Frankl and William Rupert that the property management

> agreement, whereby Mr. Rupert is to manage the property at 9018-9024 Beverly Boulevard, Los Angeles, CA, shall be and hereby is amended by this agreement wherein Ms. Frankl, the landlord, appoints Mr. Rupert as the landlord's attorney-in-fact in place and stead of landlord with full authority to terminate, rescind and revoke the lease of space within the premises in any instance where landlord does not do so, Landlord shall not revoke such appointment, and Landlord and Mr. Rupert shall cooperate to effectuate the purposes of termination, rescission or revocation during the term of Mr. Rupert's property management agreement.

Exhibit D to Defendant's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues. The parties agree that Plaintiff never held an ownership interest in the underlying real property, although Plaintiff argues that he owns a 30% interest in the personal property debt (accrued back rent) owed by CSL.

In a letter dated February 14, 1990, Ms. Frankl wrote the following to Plaintiff:

> The situation with [CSL] is NOT a win. We both risk to lose in a very big way. It is for this reason that I have opted to dismiss the whole thing. My agreement with you was to try to incrrease the income on my property. You did your best, but there were blind spots. I don't hold this against you. I am not out to harm you, nor do I intend to let you harm me. I want that to be very clear.
>
> Our agreement was for property management, not for legal representation. You are NOT to engage in any legal proceedings on my behalf. I had no power to confer on you the power to procecute [sic] any lawsuits on my behalf. This power can only be conferred by the Superior Court of California.

> I accept this whole thing as a learning experience. I accept the loss as the price of this experience. Not all dreams come true. I ask that you do the same so that we can both get on with the more positive aspects of Life.

Exhibit Q to RTC's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues.

In a letter dated February 19, 1990, Plaintiff, "in his [purported] authorized capacities as the landlord's Property Manager/Attorney-In-Fact/Trustee" informed CSL that he was rescinding the first extended term and revoking the second, third and fourth extended term periods. Exhibit D to Rupert Decl. To justify such action, Plaintiff explained in the letter that CSL had defaulted on the terms of the original lease, thus rendering CSL ineligible to exercise any of the option periods.[1] Plaintiff demanded that CSL pay back rent in the amount of $252,000.00 -- the difference between the "reasonable rental value" and the "contract rent" actually paid during the period. In the letter, Plaintiff stated that "the tenant [CSL] must restore to the landlord the 'reasonable rental value" of the premises," but added that "[t]his net amount is due and payable to the landlord's Property Manager/Attorney-In-Fact/Trustee, Mr. Rupert." Id. (emphasis added). In his opposing papers, Plaintiff alleges that the back rent is payable to Plaintiff as a personal property obligation.[2]

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[1] In his opposing papers, Plaintiff alleges that CSL had defaulted on the terms of the original lease because, inter alia, CSL had been delinquent in paying property taxes.

[2] According to the terms of the December 4, 1989 agreement between Plaintiff and Ms. Frankl, however, Plaintiff is only entitled to either: (i) 30% of the back rent if such back rent can be characterized as a "lump sum settlement" under the terms of the agreement; or (ii) 20% of

Plaintiff set forth his understanding of the agreement between himself and Ms. Frankl in a letter dated March 29, 1990. The letter provides, in pertinent part, that:

> I [Plaintiff] agreed to take on this matter, as your [Ms. Frankl's] property manager/agent. We signed a contract that spelled out my objectives, and the compensation I could earn by achieving those objectives and collecting on your claims agsinst [CSL]. As you were the beneficiary of our contract, I was placed in a "trustee" position with regard to the trust property on Beverly Boulevard.

Exhibit O to RTC's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues (emphasis added).

On January 25, 1991, CSL was placed into conservatorship and Defendant Resolution Trust Corporation ("RTC") was appointed the conservator.

On June 2, 1993, Plaintiff filed an action in his own name as plaintiff in "Pro Per." The First Amended Complaint, filed on June 18, 1993, alleges the following causes of action: (1) unpaid back rent (personal property); (2) contract and economic interference. In the Complaint, Plaintiff alleges that he was hired as Ms. Frankl's "property manager/trustee/etc." and that she had "assigned her claims under the lease to the plaintiff." First Amended Complaint, ¶ 7, lines 18-19.

On December 5, 1994, Defendant RTC, as receiver for CSL, filed the instant Motion for Partial Summary Adjudication of Issues, alleging that Plaintiff lacks the requisite standing to bring a claim for unpaid back rent

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the back rent if such back rent can be characterized as "additional rents" under the terms of the agreement.

(personal property).[3] Plaintif filed an Opposition to Defendant's Motion for Partial Summary Adjudication of the Issues on January 17, 1995.

II. Discussion

A. Summary Judgment Standard

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); British Airways Bd. v. Boeing Co, 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)). This means that, if the moving party has the burden of proof at trial, that party must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in that party's favor. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). Furthermore, the court

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[3] Defendant brings the present Motion for summary adjudication of "claims for breach of contract," yet the causes of action set forth in Plaintiff's First Amended Complaint are limited to "unpaid back rent (personal property)" and "contract and economic interference." To reconcile Defendant's Motion with Plaintiff's Complaint, the Court interprets Defendant's Motion as a motion for summary adjudication of Plaintif's first cause of action for unpaid back rent (personal property).

must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponent's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In other words, the moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. Id. at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id.

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [T]he adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue"of material fact exists only when the nonmoving party makes a sufficient showing to establish an esential element to that party's case, and on which that party would bear the burden of proof at trial. Celotex, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." Anderson, 477 U.S. at 252. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 248; Griffeth v. Utah Power & Light Co., 226 F.2d 661,669 (9th Cir. 1955).

B. Analysis

In the instant case, it is the nonmoving party -- the Plaintiff -- who bears the burden of proof at trial. Thus, to

prevail on this Motion, Defendant RTC must establish that there is an absence of evidence to support Plaintiff's case. To overcome the Motion for Summary Adjudication, Plaintiff must then set forth sufficient evidence on which a reasonable jury could reasonably find in his favor.

Defendant argues that Plaintiff lacks the requisite standing to bring his claim for unpaid back rent on the theory that Plaintiff never had an interest in the real property, and that "there has been absolutely no evidence adduced to establish that plaintiff had anything more than a simple contingency fee arrangement with the property owner, pursuant to which he would retain as his compensation certain percentages of monies collected from the former CSL."

Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues at 4.

Plaintiff appears to allege, first, that summary adjudication of behalf of RTC is inappropriate because there are three genuine issues of material fact. Namely, Plaintiff argues that:

> It is in dispute whether the term of plaintiff's Agency Agreement was 4 months or 3 years. It is in dispute when the 4 month period was to start.
>
> It is in dispute whether Ms. Frankl ever effectively terminated her agreements with the plaintiff before the agreements expired by their own terms, whether those terms were 4 months or 3 years.

Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Partial Summary Adjudication of Issues at 3, lines 15-21.

The plain language of the agreement between Plaintiff and Ms. Frankl suggests that the term of the agreement was four months, to begin on December 4, 1989.[4] Even if this issue were in dispute, however, the court finds neither the term of the agreement nor whether the agreement expired by its own terms or upon termination by Ms. Frankl to be a genuine issue of material fact. For the purposes of this Motion, the Court agrees with RTC that the only material fact is whether Plaintiff has standing to bring an action for unpaid back rent (personal property).

In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court explained the issue of standing in the following manner:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both consituttional limitations on federal court jurisdiction and prudential limitations on its exercise . . . . In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III.

Ward, 422 U.S. at 499 (citations omitted). The Supreme Court further provided that, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third

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[4] The reference to "three years" appears not in the main text of the agreement, but only in the provision regarding compensation. The parties to the agreement clearly contemplated that Plaintiff attempt to increase the rental income for the property for a term of four months.

parties." Id. Federal Rule of Civil Procedure 17(a) encapsulates this latter requirement in its dictate that "Every action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a).

Plaintiff argues that he has standing because, as the sole rescinding party, "he is the only person who has standing to bring a cause of action for restitution following the tenants [sic] failure to return the value of the consideration they received, after the rescission by the plaintiff." Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Partial Summary Adjudication of Issues at 4, lines 1-4. Plaintiff cites to 3 Witkin, California Procedure for the proposition that "the party rescinding has an action for restitution, to recover the consideration which he gave. " Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Partial Summary Adjudication of Issues at 4, lines 22-24 (emphasis added).

What Plaintiff fails to realize is that he never gave any consideration to CSL. Indeed, there was never any contractual relationship between Plaintiff and CSL. The only contractual relationships relevant to the instant case are that established by the lease agreement between Ms. Frankl and CSL, and that established by the property management agreement betwen Plaintif and Ms. Frankl. It follows, then, that Plaintiff has no action for restitution against CSL (and now against RTC).

Plaintiff argues that, when Ms. Frankl appointed him attorney-in-fact, "with full authority to terminate, rescind and revoke the lease," she also authorized him to bring an action for restitution. However, as Plaintiff himself asserts, under California law, "The power to act is determined solely from the language of the instrument. Powers of attorney are strictly construed. Authority never is extended beyond that which is directly given or necessary and proper to carry the

authority into full effect." Jay v. Dollarhide, 3 Cal. App. 3d 1001, 1020 (1970) (citations omitted).

Nowhere in the agreement between Plaintiff and Ms. Frankl is there a grant of power to seek restitution. Accordingly, the Court finds that Plaintiff was not authorized to seek restitution from CSL (or RTC) on Ms. Frankl's behalf, and thus Plaintiff has no standing to bring his first cause of action for unpaid back rent (personal property). The Court further finds that Plaintiff has failed to meet his burden to overcome RTC's Motion for Summary Adjudication of Issues.

For all the reasons stated above, the Court hereby GRANTS Defendant's Motion for Summary Adjudication of Plaintiff's First Cause of Action for Unpaid Back Rent (personal property).

SO ORDERED.

DATED: January 30, 1995

s/ Audrey B. Collins
Audrey B. Collins
United States District Court